

INDEX

Subject Index.

Petition for Writ of Certiorari -----	1
Summary statement of matter involved -	1
Basis of jurisdiction -----	5
Questions presented -----	6
Reasons for allowance of writ -----	7
Brief in support of petition -----	8
Opinions of courts below -----	8
Statement of case -----	8
Assignment of errors -----	8
Argument -----	8
Summary -----	8
Point I—	
Certification of delinquent instalments of the special assessments directly to the county treasurer was a mere irregularity, not affecting in any way the obligation of the taxpayer to pay, the duty or obliga- tion of the county treasurer to sell or the lien of the special assessment and was in no way prejudicial to the bond- holder -----	9
Point II—	
The property owner has not escaped full liability for principal and interest be- cause of the 1935 sale, hence bondhold- ers have not suffered any damage -----	25

II

INDEX

Point III—

On no theory have more than nominal damages been established according to the state rule and the rule of the Tenth Circuit -----	37
Conclusion -----	48
Appendix -----	49
 TABLE OF CASES CITED.	
Badger v. Hoidale (CCA8) 88 F (2) 208 ..	10
Barber Asphalt Paving Co. v. City of Denver (CCA8) 72 F 336 -----	43
Berry v. Howard 33 SD 447, 146 NW 557 ---	28, 33
Biggerstoft v. City of Broken Bow (Neb) 198 NW 156 -----	21
Bullard v. Cisco 290 US 179 -----	3
Bates County v. Wills (CCA8) 239 F. 785 --	44
Campbell v. Equitable Loan and Trust Co. 14 SD 483, 85 N.W. 1015 -----	28
City of Canton v. Tinan Receiver (CCA8) 104 F (2) 961 -----	24, 25, 42, 43
City of McLaughlin v. Turgeon (CCA8) 75 F (2) 402 -----	24, 25, 42, 43
City of Superior v. Simpson (Neb) 209 NW 505 -----	21
City of Winner v. Kelley (CCA8) 65 F (2) 955 -----	9, 24, 25
Clark v. Belt (CCA8) 223 F. 573 -----	43
Coats v. Lunt 210 Mass. 314, 96 NE 685 ----	25
Coolsaet v. City of Veblen 55 SD 485, 226 NW 726 -----	47

INDEX

Culhane v. Equitable Life Assurance Society 65 SD 337, 274 NW 315 -----	35
Easton v. Cranmer 19 SD 224, 102 NW 944 -----	33
Erie R. Co. v. Tompkins 304 US 64 -----	6, 38, 42, 43
Freese v. City of Pierre, 37 SD 433, 158 NW 1013 -----	45, 46
French v. Edwards 13 Wall. 506 -----	23
Gamble v. Keyes 43 SD 245, 178 NW 870 ---	40
Grand Lodge v. City of Bottineau 58 ND 740, 227 NW 363 -----	45
Grand Lodge v. City of Winner 63 SD 390, 259 NW 278 -----	9, 24, 25
Gray v. City of Santa Fe (CCA10) 89 F (2) 406 -----	6, 37
Gross v. City of Bowdle 44 SD 132, 182 NW 629 -----	2, 38
Hackney v. Elliott (ND) 137 NW 433 -----	21
Hayne v. City of San Francisco (Cal) 162 Pac. 625 -----	30
Home Bldg. & Loan Assn. v. Blaisdell 290 US 398 -----	35
Huckstedt v. Jamison, 59 SD 464, 240 NW 506 -----	32
In re City Comptroller (Minn) 76 NW 259 -	22
Kirby v. Waterman 17 SD 314, 96 NW 129 -	22
Lincoln v. Ricketts 296 US 374 -----	44
Londen v. Taxing District 14 Otto 771 -----	41
Mallery v. Griffin 43 SD 71, 177 NW 818 ----	23
McKinnon v. Ruller 33 SD 582, 146 NW 910 -----	33
Midland Valley R. Co. v. Excelsior Coal Co. (CCA8) 86 F (2) 177 -----	39
Moore v. City of Nampa 276 US 536 -----	6, 37, 38

IV

INDEX

Munsell v. City of Hebron (Neb) 220 NW 289	21
Oklahoma City v. Vahlberg (Okla) 89 P (2) 962 -----	20
Parker v. Challiss 9 Kan. 155 -----	20
Peake v. City of New Orleans 139 U. S. 342	37
Pettigrew v. Moody County, 17 SD 275, 96 NW 94 -----	27, 33
Roberts v. Minneapolis Threshing Mach. Co. 8 SD 579, 67 NW 507 -----	40
Rosekrans v. Wagner 29 SD 181, 135 NW 681	28
Salmer v. Clay County 20 SD 307, 105 NW 623	28
Smyth v. State (Ind) 62 NE 449 -----	19
State v. Day County 64 SD 370, 226 NW 726	22
State ex rel v. Mayor (Wis) 77 NW 167 ---	20, 30
State Auditor v. Jackson County 65 Ala. 142	23
Stephens v. Spokane (Wash) 44 P. 541 -----	39
Story Parchment Co. v. Paterson Paper Co., 282 US 555 -----	39
Suttor v. Town of Wetonka 62 SD 339, 259 NW 64 -----	2, 38
Swift v. Tyson, 16 Pet 1 -----	43
Thompson v. Roberts 16 SD 403, 92 NW 1079	33
US v. Madigan 300 US 500 -----	10
Webster v. Cressler 65 SD 571, 276 NW 263	33, 36
Whittaker v. Deadwood 12 SD 608, 82 NW 202 -----	32, 33
Wolden v. Larson (CCA9) 164 F. 548 -----	43
Wylly v. Grigsby 10 SD 13, 79 NW 1049, 11 SD 491, 78 NW 957 -----	40
Zipp v. Rubber Co. 12 SD 218, 80 NW 367 ---	31

INDEX

STATUTES

Federal Statutes

Act of February 13, 1925, Ch. 228, Sec. 1 --	5
Act of February 13, 1925, Ch. 229, Sec. 8 --	5
Judicial Code, Sec. 240 (a) -----	5
43 Stat. 939 -----	5
24 Stat. 940 -----	5
28 USC Sec. 437 (2) -----	5
28 USC Sec. 350 -----	5

South Dakota Statutes

SD Session Laws of 1919, Ch. 110, Sec. 1 ---	17
SD Session Laws 1921, Ch. 319 -----	2
SD Session Laws 1923, Ch. 226 -----	2
SD Session Laws of 1929, Ch. 187 -----	4, 11, 12
SD Session Laws 1933, Ch. 64 -----	34
SD Session Laws 1933, Ch. 65 -----	34
SD Session Laws 1933, Ch. 197 -----	26
SD Session Laws 1935, Ch. 178 -----	35
SD Session Laws 1937, Ch. 207 -----	35
SD Session Laws 1937, Ch. 241 -----	35
SD Session Laws 1937, Ch. 248 -----	26
SD Session Laws 1939, Ch. 145 -----	35
SD Session Laws 1939, Ch. 279 -----	35
SD Session Laws 1939, Ch. 280 -----	35
SD Session Laws 1939, Ch. 284 -----	35
SD Political Code of 1903, Sec. 1319 -----	46
SD Revised Code 1919, Sec. 1957 -----	6
SD Revised Code 1919, Sec. 1959 -----	6, 38
SD Revised Code 1919, Sec. 1960 -----	39

VI

INDEX

SD Revised Code 1919, Sec. 1966 -----	6, 38
SD Revised Code 1919, Sec. 1984 -----	6
SD Revised Code 1919, Sec. 2002 -----	39
SD Revised Code 1919, Sec. 2003 -----	6, 31, 39
SD Revised Code 1919, Sec. 6402 -----	11
SD Revised Code 1919, Sec. 6403 -----	21, 33, 36
SD Revised Code 1919, Sec. 6405 -----	2
SD Revised Code 1919, Sec. 6412 -----	26, 46
SD Revised Code 1919, Sec. 6752 -----	13
SD Revised Code 1919, Sec. 6754 -----	14, 18
SD Revised Code 1919, Sec. 6755 -----	14, 18
SD Revised Code 1919, Sec. 6756 -----	18
SD Revised Code 1919, Sec. 6757 -----	15
SD Revised Code 1919, Sec. 6765 -----	15
SD Revised Code 1919, Sec. 6767 -----	16
SD Revised Code 1919, Sec. 6768 -----	17
SD Revised Code 1919, Sec. 6787 -----	26
SD Revised Code 1919, Sec. 6792 -----	26
SD Revised Code 1919, Sec. 6794 -----	29, 30, 34
SD Revised Code 1919, Sec. 6797 -----	4, 10, 11, 29
SD Revised Code 1919, Sec. 6803 -----	35

RULES OF COURT

Revised Rules of the Supreme Court, Sec. 5 (b), Rule 38 -----	5, 6
--	------

TEXTS

Corpus Juris, Vol. 44, page 757, Sec. 3309 --	30
Sugden, Powers, p. 393 -----	25

IN THE
Supreme Court of the United States

OCTOBER TERM, 1940

No. _____

CITY OF HURON, a Municipal Corporation,

Petitioner,

vs.

T. G. EVENSEN, Trustee,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT
THEREOF.

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petition of the City of Huron, a Municipal Corporation, respectfully shows to this Honorable Court:

A.

SUMMARY OF THE MATTER INVOLVED.

This was an action at law brought in the United States District Court for the District of South Dakota by the respondent against the City of Huron, a Municipal Corporation of the first class of the State of South Dakota, to recover a judgment for an alleged default of the city auditor of the city in certifying delinquent instalments of

special assessments for paving certain streets in the city of Huron.

Pursuant to statute, the city improved certain streets by paving and assessed the cost against the property benefited. Under the South Dakota statute, the contractor could be paid either by issuing special assessment certificates (SD Revised Code 1919 Section 6405) or the city could issue bonds to pay the cost of the improvement. (Chapter 319 SD Sessions Laws 1921).

The city adopted the latter method in this case and sold negotiable bonds for the full amount of the contract price. These bonds were, in no sense, obligations of the city. The security for their payment was not the taxing power of the city but the assessments levied and apportioned against the property benefited.* Following statutory permission, (Ch. 226, S. D. Session Laws 1923) the assessments against the property were divided into ten equal annual instalments, (60).

The alleged liability resulted solely from the claimed default on the part of the city auditor.

The entire bond issue was \$27,000. The bonds are dated November 1, 1931 and are in the sum of \$1,000 each. The action was commenced in May 1939. The bonds are numbered successively in the order of maturity. The first nine bonds had been paid prior to the commencement of the action. Bonds Nos. 10 and 11 matured November 1, 1935 and the other bonds matured three each year thereafter until November 1, 1940. Bonds Nos. 22 to 27, inclusive, had not matured at the time of the commencement of the action nor at the entry of the judgment. Bonds Nos. 22, 23, and 24 matured November 1, 1939 and bonds Nos. 25, 26 and 27 matured November 1, 1940. At the time of the commencement of the action, the city had collected and paid interest in full on bonds commencing with Nos. 10 to

* The bonds were not debts of the city. *Suttor v. Town of Wetonka*, 62 S. D. 339, 253 N. W. 64; *Gross v. City of Bowdle*, 44 S. D. 132, 182 N. W. 629.

27, inclusive, to the first day of May, 1935. No part of the interest maturing and becoming due since that date had been paid at that time and no part of the principal of bonds commencing with Nos. 10 to 27, inclusive, has been paid. These bonds are owned by various persons and the plaintiff below was a trustee of seventeen of them. (14).

The question of jurisdictional amount is not before this Court because the petitioner conceded below and concedes here that the plaintiff below came within the scope of the ruling in the case of *Bullard v. Cisco*, 290 US 179.

Collections from the property benefited have been paid over by the city as received and have not been sufficient to make any payments other than those which the city has made. From a balance on hand at the time of the commencement of the action and collected subsequent to that time, the city has paid to the plaintiff below for pro rata distribution among the seventeen bondholders whom he represents, the sum of \$2,125.00 which has been credited on the amount alleged to be due under a stipulation that this should be without any prejudice to the rights of either the plaintiff or the defendant.

The procedure resulting in the levy of the special assessments against the property benefited is not challenged. The findings of the trial court are to the effect that all proceedings leading up to the issuance, execution and delivery of the bonds were regular (53).

The trial court entered judgment against the city for the full amount of the principal of the unpaid bonds plus accrued interest and less the meantime partial payments. (64-65). The Circuit Court of Appeals on appeal affirmed this judgment. (75-80). The theory upon which the action was brought, and followed by the trial court and the Circuit Court of Appeals, was that there were defects in certifying the delinquent instalments for the years 1932 to 1936.

In those years, the city auditor certified the instal-

ments that were delinquent in a form of certificate (38-40-41-42-43-44) that contained all of the information required by the applicable statute, Chapter 187 SD Session Laws 1929. This statute provides as follows:

"It shall be the duty of the city auditor or town clerk, between the fifteenth day of September and the first day of October in each year, to certify to the county auditor of the county in which such municipality is located, or if located in more than one county, to the county auditor of the county in which the property assessed is located, all special assessments remaining unpaid, which became delinquent on or before the fifteenth day of September of that year. In certifying such special assessments, the city auditor or town clerk shall specify the consecutive number of the assessment, as shown by the tax book in his office, the original amount of the assessment, or installment thereof, so certified, the amount of the interest and penalty thereon to the fifteenth day of September of that year, the name of the person in whom the title to the property rests, as shown by said tax book, the character of the improvement for which the assessment was made, and a brief description of the property against which the assessment was made, and it shall be the duty of the county auditor and county treasurer to proceed, with reference to such assessment, as provided in Section 6797."

Section 6797 S. D. Rev. Code 1919 requires the county auditor to certify the matter certified to him to the county treasurer, who makes sale of the property at the annual tax sale.

In those years, however, instead of certifying the delinquencies to the county auditor as required by this statute, he certified them direct to the county treasurer. The county treasurer, in 1935, sold the properties certified to him that were listed as delinquent that year and the purchaser was Beadle County, the county in which the City of

Huron is located (62). Subsequent and prior certifications of delinquent instalments have included substantially the same property. There have been some redemptions and a few additional pieces have been certified. (45-52). In 1937 and 1938, certifications by the city auditor were to the county auditor (43-61).

The respondent in this court made no proof of damages whatsoever at the trial but rested his case in the trial court and in the Circuit Court of Appeals upon the proposition that upon the mere proof of a default or error in certification by the city auditor of delinquent instalments the city would become liable for the full amount due upon the bonds.

B.

STATEMENT OF THE BASIS OF THE COURT'S JURISDICTION

1. This Honorable Court has jurisdiction to review the judgment of the Circuit Court of Appeals for the Eighth Circuit by virtue of the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Ch. 228, Section 1, 43 Stat. 938 (28 USC Sec. 347 (a)), and under the same act, Ch. 229, Section 8, 24 Stat. 940 (28 USC 350) and under Paragraph B, Section 5, Rule 38, Revised Rules of the Supreme Court of the United States adopted February 13, 1939, effective February 27, 1939. Federal jurisdiction is based upon diversity of citizenship. (1).

2. The date of the judgment of the Circuit Court of Appeals to be reviewed is July 9, 1940. (80). Appended hereto is a copy of the opinion of the Circuit Court of Appeals. (Appendix 1). On July 31, 1940, a rehearing was denied by the Circuit Court of Appeals (89).

This petition for certiorari and the certified transcript of the record are being filed in this court within three months of the date of the judgment.

3. This is a proper case for the exercise by this court of its power of review. *Erie R. Co. v. Tompkins*, 304 US 64; Revised Rules of the Supreme Court of the United States adopted Feb. 13, 1939, Rule 38, 5 (b); *Magnum Import Co. v. Coty*, 262 US 159, as will be more fully amplified in the brief in support of this petition. The judgment of the Circuit Court of Appeals is in conflict with the statutes of South Dakota pertaining to damages (Secs. 1957, 1959, 1966, 1984, 2003 SD Revised Code 1919); it is contrary to the established rule of this court, *Moore v. City of Nampa*, 276 US 536, and is also in conflict with the decision of the Circuit Court of Appeals of the Tenth Circuit on the same question, *Gray v. City of Santa Fe* (CCA10) 89 F(2) 406.

C.

STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals for the Eighth Circuit err in holding that the certification by the city auditor directly to the county treasurer was more than a mere irregularity and not such a procedural defect as to affect the lien for the special assessment, sales held by the county treasurer pursuant to such certifications, or the liability of the property to respond therefor?

2. Did the Circuit Court of Appeals for the Eighth Circuit err in holding that certification by the city auditor directly to the county treasurer was more than a mere irregularity and was so substantial as to make the city liable in damages?

3. Did the Circuit Court of Appeals for the Eighth Circuit err in holding that upon proof of a defective certification or an error in certification, without more, the city was liable in substantial damages, to the amount of the face of the bonds unpaid with interest thereon?

4. Did the Circuit Court of Appeals err in not holding that the plaintiff below had failed to prove more than nominal damages?

D.

REASONS RELIED ON FOR ALLOWANCE
OF THE WRIT

1. The decision of the Circuit Court of Appeals holding that the certification by the city auditor direct to the county treasurer was a substantial breach of the bonds, and made the city liable for the full amount of the bonds, principal and interest then unpaid, was in conflict with the decisions of this Honorable Court, the Circuit Court of Appeals for the Tenth Circuit, and with the statutes of the State of South Dakota, and the decisions of the Supreme Court of that state.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 11687 At Law, City of Huron, a municipal corporation, appellant, vs. T. G. Evensen, Trustee, appellee, and that the said judgment of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioner will ever pray.

CITY OF HURON, a Municipal Corporation,
Petitioner,

MAX ROYHL

GEORGE E. LONGSTAFF,

Counsel for Petitioner.